SEVENTY-SEVENTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

REFORM OF THE LAW OF DELIVERY OF DEEDS

1987

SEVENTY-SEVENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REFORM OF THE LAW OF DELIVERY OF DEEDS

TO:

The Honourable C.J. Sumner, M.L.C.,

Attorney-General for South Australia.

Sir,

You have referred to us the question of the reform of the law relating to delivery of deeds.

In the Sixteenth Report of this Committee we recommended the reform of the law relating to the sealing of deeds and as a result Section 41 of the Law of Property Act, 1936 was amended to its present form. The Chairman of this Committee in Rose and Rose v. The Commissioner of Stamps, Burgess and Topex Nominees Pty. Ltd. v. The Commissioner of Stamps (1979) 22 S.A.S.R. 84 held that the amendment of Section 41 did not alter the law relating to the delivery of deeds. Accordingly the documents in question in that case which were expressed on the face of them to be signed, sealed and delivered by the parties but were in fact intended and treated by them as only agreements under hand, were not stampable as deeds because delivery had not been proved and the only evidence submitted to the Commissioner of Stamps proved the contrary.

As a result the Law Society of South Australia have communicated with you on the subject, hence this reference by you to the Committee.

Many of the difficulties which arise in relation to this branch of the law are due to the fact that the law has over a matter of centuries moved from a concept of delivery by

physical act or by words spoken to a question of the intention of the party delivering the deed.

Originally delivery was a physical act or word spoken very much akin to delivery of seisin of land: see the judgment of the Court of Wards in Thoroughgood's case in Hil. 9 Jac. 1 (1612) 9 Co. Rep. 1366, 77 E.R. 925 where all the older law is set out.

The older law is well summarized in Sheppard's Touchstone (7th Edn 1820) page 57:-

> "The fifth thing required in every well made deed is, that there be a delivery of it. And for this it must be known, that delivery is actual; i.e. by doing something and saying nothing; or it may be by both. And either of these may make a good delivery, and a perfect deed. But by one or both of these (means) it must be made; for otherwise, albeit it be never so well sealed and written, yet is the deed of no force. And though the party to whom it is made take it to himself, or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt, until it be delivered. And a deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent; for omnis ratihabitio mandato aequiparatur."

The present law as to delivery of deeds is set out in Odgers on the Construction of Deeds and Statutes (5th Edn. 1967) pages 7-8 as follows:-

> "Any act of the party which shows that he intends to deliver the deed as an instrument binding on him is enough. He must make it his deed and recognise it as presently binding on him. In one extreme case delivery was inferred merely because the document had been signed and sealed (and the author there refers to Hall v. Bainbridge (1848) 12 Q.B. 699).
>
> Delivery is nonetheless complete and effective because the grantor retains the deed in his own possession, so that it was early recognized that the deed need not be actu ally delivered to the other party of the deed" (and he then refers to Xenos v. Wickham (1867) L.R. 2 H.L. 296 in the speech of Lord Cranworth at page 323 and in the advice of Pigott B. at page

309).

A longer description of the same process is contained in the Second Edition of Halsbury's Laws of England (1928) Volume 10 s.v. "Deeds" at pages 197-198. The title "Deeds" in that edition of Halsbury was written by Mr. Lightwood who was probably the leading conveyancing counsel of his time. His views are found in paragraph 241 of that Volume at pages 197-198 as follows:-

> "In order to be effective a deed must be delivered as the act and deed of the party expressed to be bound thereby, as well as sealed. No special form or observance is necessary for the delivery of a deed, and it may be made in words or by conduct. In modern practice the usual form of delivering a deed is for the executing party to say, while putting his finger on the seal, 'I deliver this as my act and deed'. But it is not necessary that the deed should actually be delivered over into the possession or custody of the person intended to take the benefit thereof, or of some person (other than the party to be bound by the deed) to his use; though if the party to be bound so hands over the deed that is a sufficient delivery. What is essential to delivery of the document as a deed is that the party whose deed the document is expressed to be (having first sealed it) shall by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the provisions contained therein. It is not necessary to the execution of a deed that it should be read over by or to the executing party before or at the time of its delivery, even though he be illiterate or blind; for if he is content to dispense with so informing himself of the contents of the deed he will be estopped from averring that it is not his deed. If the sealing of a deed is proved, its delivery as a deed may be inferred, provided there is nothing to show that it was only delivered as an escrow."

Thus, there is no prescribed form of procedure for delivery. Delivery merely means any words, writing or conduct which shows an intention to be bound by the terms of the deed, and this is so even though the deed remains in the possession of the maker.

Delivery in Escrow

In many instances the maker of a deed will wish to suspend the operation of a deed until a specified event. For example, a person selling land will not wish the deed of transfer to operate until payment is made.

For this reason, it came to be accepted that a deed may be delivered subject to certain conditions or the happening of some event. This is known as delivery as an escrow; the document is not an operative deed if it has such a contingency attached to it until such time as the contingency is resolved, that is the condition is fulfilled or the event takes place.

Lord Cranworth in Xenos v. Wickham (1867) L.R. 2 H.L. 296 explained escrow in the following manner at page 323:-

> "The maker (of the deed) may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived or till some condition has been performed, but when the time has arrived or the condition has been performed, the delivery becomes absolute and the maker of the deed is absolutely bound by it, whether he has parted with possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow."

Classically an escrow was a document delivered to a "stranger" or "third person" to be handed over by him to the other party to the transaction upon the happening of a certain condition at which moment it became a deed. But it was eventually extended so that even a document handed to the other party to the transaction could be an escrow if it was not intended to be effective as a deed until the happening of some condition precedent (London Freehold and Leasehold Property Co. v. Suffield (1897) 2 Ch. 608).

No express words need to be used to indicate that the

delivery is in escrow. In Nash v. Flynn (1844) 1 Jo. & Lat. 162 at p.175 Lord Sugden L.C. stated, "It is quite settled that it is not necessary in delivering an instrument as an escrow to say that it is delivered as an escrow". On the other hand a document described as an escrow may not be an escrow in law: See Foundling Hospital (Governors and Guardians) v. Crane and another (1911) 2 K.B. 367. It is thus a question of what was intended by the grantor at the time.

It is not correct to view an escrow as simply a deed which, although having left the grantor's possession, has not yet been "delivered". For an escrow is a document which in fact has been delivered, subject to a condition precedent; that is to say it is a document which is intended to have complete effect as a deed provided a certain stated event happens; see J.G. Monroe and R.S. Nock, The Law of Stamp Duties (5th edn., 1976) at p.38.

Thus while the parties await the happening of the event the grantor cannot recall or resile from the document, all he can do is await performance of the condition by the other party, see Foundling Hospital (supra) and Beesley v. Hallwood Estates Ltd. (1961) 1 Ch. 105 at 119, per Donovan L.J.

While the English Court of Appeal has imposed some limits on the time within which the other party must perform the condition, the extent of the limits is uncertain: see Beesley v. Hallwood Estates Ltd. (supra) at 118 per Harman L.J. "unreasonable delay" at 120 per Lord Evershed, "long enough delayed"; Kingston v. Ambrian Investment Co. Ltd (1975) 1 W.L.R. 161 at 161 per Lord Denning M.R. "within a reasonable time" at 168-169 per Buckley L.J. "in due course"; Glessing v. Green

(1975) 1 W.L.R. 863 at 869 per Sir John Pennycuick, Russell and Stamp L.JJ. "time beyond which it could not be said that the sale would be capable of completion in due course".

While it is understandable that in some instances the grantor may wish to have an opportunity to revoke or recall a deed delivered as an escrow at some stage before the condition upon which it is dependant is satisfied; this as has been stated previously is not possible. If the deed is expressed to be delivered subject to some overriding power to revoke or recall the deed then the deed will be a nullity, or to put it another way, it will be regarded as not having been delivered, see Donovan J. in Beesley v. Hallwood Estates Ltd., supra, at p. 119. See also the judgment of Cross J. in Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd. (1961) Ch. 88 where His Lordship states at pages 100-101:

> "The question which then arises is whether, if a deed is sealed and handed to an agent of the grantor to deal with in a certain way on the footing that it is not to become binding on the grantor until the instructions are fully complied with, and the instructions are revocable by the grantor so long as they are not yet complied with, the deed can be regarded as having been delivered as an escrow. In other words, can the carrying out of revocable instructions be regarded as conditions of a delivery by the grantor, or should such a deed be regarded as not having been delivered at all by the grantor, with the result that the agent must be authorized by a deed to deliver it for the grantor when he has carried out his instructions?"

His Lordship ultimately concluded at page 103:-

> ". . . that a deed cannot be delivered as an escrow at all, subject to an overriding power in the grantor to recall the deed altogether....."

Delayed Delivery

As delivery is necessary for a document to become an operative deed, it would seem that it should be possible to delay the operation and binding effect of a document which is otherwise executed by delaying delivery.

Delivery, be it conditional or unconditional, will usually be presumed from the mere fact of signing and sealing a document which is in the form of a deed; that is to say that it will be inferred that the maker of the deed intends to be bound by it. However, this inference may be rebutted if it is shown that the maker of the deed did not intend to make it immediately binding on himself. Of course this form of negative intention will often be extremely difficult to prove, but this does not detract from the fact that it is possible to delay delivery and hence the effectiveness of a document which purports to be a deed.

Indeed in the case of Hooker Industrial Developments Pty. Ltd. v. Trustees of Christian Brothers (1977) 2 N.S.W.L.R. 109 the presumption of delivery was rebutted. In that case the trustees, a corporation, had agreed to sell land to the plaintiff company. The evidence showed that both parties contemplated an exchange of contracts in accordance with the usual conveyancing procedure. The form of the agreement was a deed of option with a contract of sale annexed to it. Each party executed its counterpart under common seal and returned to its solicitor for eventual exchange. Before the exchange, the trustees decided to withdraw from the transaction, whereupon the company sought to enforce the option.

Helsham C.J. in Equity decided in favour of t plaintiff, holding (inter alia) that execution by a company do not necessarily involve delivery if the requisite intention the part of the company is absent. He held that on the eviden the intention by both parties was that the transaction would n be binding until an exchange of counterparts. Thus, the truste had not delivered the deed at all even though they had handed over to their solicitor, and so the deed could be withdrawn.

Helsham C.J. in Eq. in reaching his conclusion ma the following remarks in relation to the point in dispute:-

> "It may be that difficulties associated with the delivery of deeds by agents of grantors have led to findings that deeds have been executed in escrow. If the law in the present day and age still requires companies in our society to appoint an agent or attorney under seal, before that agent can effect delivery of any deed of the company, then one can understand this. But this situation does not warrant a finding that a deed was delivered in escrow, when in fact delivery by exchange was intended, even though the latter might not be legally effective through want of a power of attorney or other solemn authorization."

The ability to delay delivery was also accepted in t recent case of Ansett Transport Industries (Operations) Pty. L v. Comptroller of Stamps (1985) V.R. 70. In that case t question of whether or not the deed of mortgage was dutiable Victoria, was dependent upon the time that delivery took pla The facts of the case were that a company proposed to borr funds to finance the purchase of two aircraft. The lend required the loan to be guaranteed by the Commonwealth, and, security for its liability under the guarantee, the Commonweal required the company to grant it a mortgage of the aircra After drafts of the mortgage had been prepared and agreement l been reached as to its terms, on 31 May 1979 the common seal

the company was affixed on the deed of mortgage in Victoria in the presence of two directors and its secretary. The deed was then sent to Canberra for execution on behalf of the Commonwealth. There, on 7 June 1979, the deed was dated and executed on behalf of the Commonwealth; and all the transactions proceeded to their conclusion.

The argument for the appellant was that, so far as it was concerned, there was no effective delivery of the instrument (in terms of execution) before the Commonwealth executed it and especially that no execution and transmission of it by the appellant to the Commonwealth constituted such delivery. The point made was that the instrument was really only an offer addressed to the Commonwealth and that no obligation of any kind was created by it until it had been accepted by the Commonwealth's execution of it. The alternative argument was that, if the document was to be regarded as the appellant's deed it did not become so until delivered to the Commonwealth, and that it was not delivered (in terms of execution) until it was handed over to the Commonwealth Crown Solicitor in Canberra.

Tadgell J. did not consider this analysis correct. He said at pages 76-71:-

> "I do not consider that the affixing of the appellant's seal can be regarded as having been done idly, superfluously or as a piece of supererogation, as it would have been had the document been sent as a mere revocable offer and not as the deed of mortgage it purported to be. In my opinion the evidence reveals that the seal was affixed as part of a process of the de facto execution of the instrument as a deed (cf. Federal Commissioner of Taxation v. Taylor (1929) 42 C.L.R. 80 at p.88) and not as an offer. There was no evidence by way of a minute of the appellant's board or otherwise which tended to suggest that the instrument was sealed otherwise than as a deed. Nor, for example,

was the covering letter with which it and the other documents had been sent to Canberra tendered for the purpose of showing that it had been executed otherwise than as a deed. I think the evidence on the matter is really all one way.

Having come to that conclusion, I must consider when the instrument first became effective as the appellant's deed, it being common ground that it did at some stage do so. The instrument did not become binding as the appellant's deed before it was "delivered" in the sense that an effective deed must be delivered by its maker. As I have indicated, counsel for the appellant submitted that delivery in this sense occurred at the earliest when the sealed instrument was put into the Commonwealth's hands in Canberra. For the respondent, on the other hand, the submission was that the instrument was fully executed upon its having been sealed for, by sealing it, the appellant demonstrated that it intended to be bound. An alternative argument for the respondent was that the appellant's dealing with the instrument in Victoria, by sending it off to Canberra after sealing it, showed its intention to be bound, and therefore amounted to delivery in Victoria before it reached the Commonwealth."

Tadgell J. after examining the case law relating delivery stated at page 78:-

"These passages show that the actual handing over of the instrument to the Commonwealth Crown Solicitor in Canberra was by no means necessary to complete the process of its formal execution by way of delivery if, before that was done, the appellant otherwise evinced an intention to be bound. Whether there was such an intention is purely a question of fact - a jury question: Xenos v. Wickham (1867) L.R. 2 H.L. p. 309, per Piggott (sic) B. That the appellant did evince such an intention in Victoria is, I think, clear. In my opinion it did so deciding to transmit the document to the Commonwealth, by parcelling it up and arranging to have it sent by air to Canberra. All this was done in Victoria and I accordingly conclude that the instrument was both sealed and delivered as a deed in Victoria."

Thus from the circumstances of the case Tadgel concluded that delivery occurred at the time when the appel made arrangements to have the document sent to Canberra. As was on the 4th of June and the seal of the company was affixe

the 31st of May, it is clear that delivery did not take place at the time of sealing. This however did not assist the appellant as delivery (albeit conditional delivery) was still held to have taken place in Victoria with the result that the deed was dutiable there.

Although it is possible to "deliver" a deed at some time later than when the document purporting to be a deed is signed and sealed and thus avoid the inconvenience of irrevocability associated with delivery in escrow, delaying of delivery is not as easy as it might seem. The major difficulty of course is the fact that there is at common law a prima facie presumption that the maker of a deed intends to be bound upon that deed being signed and sealed. That is to say that where a document in the form of a deed is signed and sealed it is presumed to be delivered. As this presumption is capable of being rebutted, it would seem that the maker of a deed could avoid this difficulty by clearly evincing his intention not to be bound in a similar manner to that utilized where there is delivery in escrow. For example, the grantor could attach a covering letter explaining that the deed was intended to have no effect whatsoever until such time as clear indication is given that it is to do so.

A further difficulty of a technical nature may arise when it is desired to postpone delivery. Often it is the very fact that the grantor will not be able to be present at the time when the deed is intended to take effect (for example at settlement) that has meant that the document had to be signed at an earlier date. In such a case, if the grantor wishes to avoid

the irrevocability involved in delivery in escrow, he will ne to have an agent effect delivery at the appropriate time.

Delivery by way of an agent is also not witho difficulties. This is due to the requirement that if delivery to be effected by an agent, then the agent must be himse authorized by deed to perform the delivery.

That this is so is clear from the judgement of Joyce in Re Seymour (1913) 1 Ch. 475 at 481 where he said:-

> "There are certain things in the law which are well settled, whether you like it or not, and one is that an authority to an attorney to deliver a deed on behalf of another can only be conferred by an instrument under seal duly executed by the principal."

However, as was remarked by Helsham C.J. in Hooke case (supra) quoted above, difficulties of this nature do r warrant a finding that a deed was delivered in escrow when fact delayed delivery was intended even though the latter mi not be legally effective through want of power of attorney other solemn authorisation.

We note with interest the comments of the Law Ref Commissioner of Victoria in a report relating to the delivery deeds that there was no convincing reason why an agent should be authorised to deliver a deed on behalf of a principal with the necessity of an appointment under seal. The Victorian Reform Commission recommended that the rule requiring t formality be abolished. The Victorian Parliament has implemer this recommendation in the Property Law (Delivery by Agent) 1981.

Deeds executed by Corporations

In the world of commerce, persons seeking to rely

the deed of a corporation may encounter at least two problems. First, it is often difficult to ascertain whether the deed has been duly sealed by the corporation, and secondly, it is often difficult to ascertain whether or not the deed has been delivered.

The first difficulty appears to have been dealt with at least in relation to companies by section 68A of the Companies (South Australia) Code 1981 (as amended by No. 108 of 1983) which provides:-

> "SECTION 68A PERSONS HAVING DEALINGS WITH COMPANIES, &c.
>
> 68A(1) (Certain assumptions not to be denied by company) A person having dealings with a company is, subject to subsection (4), entitled to make, in relation to those dealings, the assumptions referred to in subsection (3) and, in any proceedings in relation to those dealings, any assertion by the company that the matters that the person is so entitled to assume were not correct shall be disregarded.
>
> 68A(2) (Persons entitled to assume good title from company) A person having dealings with a person who has acquired or purports to have acquired title to property from a company (whether directly or indirectly) is, subject to subsection (5), entitled to make, in relation to the acquisition or purported acquisition of title from the company, the assumptions referred to in subsection (3) and, in any proceedings in relation to those dealings, any assertion by the company or by the second-mentioned person that the matters that the first-mentioned person is so entitled to assume were not correct shall be disregarded.
>
> 68A(3) (Persons entitled to make certain assumptions when dealing with company) The assumptions that a person is, by virtue of subsection (1) or (2), entitled to make in relation to dealings with a company, or in relation to an acquisition or purported acquisition from a company of title to property, as the case may be, are:-
>
> (a) that, at all relevant times, the memorandum and articles of the company have been complied with;
>
> (b) that a person who appears, from returns

lodged with Commission under section 238 or with the Corporate Affairs Commission, or the Registrar of Companies under the corresponding provision of a previous law of the State, to be a director, the principal executive officer or a secretary of the company has been duly appointed and has authority to exercise the powers and perform the duties customarily exercised or performed by a director, by the principal executive officer or by a secretary, as the case may be, of a company carrying on a business of the kind carried on by the company;

(c) that a person who is held out by the company to be an officer or agent of the company has been duly appointed and has authority to exercise the powers and perform the duties customarily exercised or performed by an officer or agent of the kind concerned;

(d) that an officer or agent of the company who has authority to issue a document on behalf of the company has authority to warrant that the document is genuine and that an officer or agent of the company who has authority to issue a certified copy of a document on behalf of the company has authority to warrant that the copy is a true copy;

(e) that a document has been duly sealed by the company if:-

(i) it bears what appears to be an impression of the seal of the company; and

(ii) the sealing of the document appears to be attested by 2 persons, being persons of whom, by virtue of paragraph (b) or (c), may be assumed to be a director of the company and the other of whom, by virtue of paragraph (b) or (c), may be assumed to be a director or to be a secretary of the company; and

(f) that the directors, the principal executive officer, the secretaries, the employees and the agents of the company properly perform their duties to the company.

68A(4) (Exception where actual knowledge) Notwithstanding subsection (1), a person is not entitled to make an assumption referred to in subsection (3) in relation to dealings with a company if:-

(a) he has actual knowledge that the matter that, but for this subsection, he would be entitled to assume is not correct; or

(b) his connection or relationship with the company is such that he ought to know that the matter

that, but for this subsection, he would be entitled to assume is not correct,

and where, by virtue of this subsection, a person is not entitled to make a particular assumption in relation to dealings with a company, subsection (1) has no effect in relation to any assertion by the company in relation to the assumption.

68A(5) (No assumption of good title where actual knowledge to contrary) Notwithstanding subsection (2), a person is not entitled to make an assumption referred to in subsection (3) in relation to an acquisition or purported acquisition from a company of title to property if:-

(a) he has actual knowledge that the matter that, but for this subsection, he would be entitled to assume is not correct; or

(b) his connection or relationship with the company is such that he ought to know that the matter that, but for this subsection, he would be entitled to assume is not correct,

and where, by virtue of this subsection, a person is not entitled to make a particular assumption in relation to dealings with a company, subsection (2) has no effect in relation to any assertion by the company or by any other person in relation to the assumption.

Section 68A(3)(e) only refers to the sealing of documents and would appear to leave undisturbed the law relating to undelivered deeds or deeds in escrow. This is in contrast to section 74(1) of the English Law of Property Act 1925, as amended, which deems due execution by a corporation, leading to confusion as to whether execution means sealing only or also includes delivery. For example in Beesly v. Hallwood Estates Ltd. (1960) 1 W.L.R. 549 Buckley J. stated at page 549:-

"I see no reason in the present case to conclude that the sealing of the lease by the defendants did not import delivery so as to constitute due execution either unconditionally or in escrow. Indeed, the plaintiff being a "purchaser" within the meaning of the Law of Property Act, 1925 I think that I am bound by section 74 of that Act, to treat the lease as having been duly executed by the defendants and this in my judgment involves treating the lease as having been not

only sealed but also delivered."

Buckley J. reinforced this decision in the later c. of D'Silva v. Lister House Ltd. (1971) 1 Ch. 17. He stated:-

> "(Section 74) says that the document is to be deemed to have been duly executed and execution imports not only sealing the document, but also delivering it as an executed document, that is to say, a document binding on the party who executed it either to take effect immediately as a deed immediately binding, or to take effect subject to some condition as an escrow. Once a document has been sealed by a company in circumstances satisfying the requirements of the section it is not in my judgment in the same position as a document signed and sealed by a private individual in the privacy of his own library and then put into a drawer without any further act showing that he intended it to be treated as a deed immediately binding upon him."

Whether this interpretation of section 74 is correct debatable. Cross J. in Windsor Refrigerator Co. Ltd. v. Bra Nominees Ltd. (1961) 1 Ch. 88 at page 98 remarked that a de whether executed by a corporation or by an individual, does necessarily bind the grantor as soon as it is sealed, but c becomes binding when it has been "delivered" by the granto his deed.

Michael Albery in an article entitled Executio Deeds by Corporations (1973) 89 L.Q.R. 14 was critical of interpretation given to section 74 in cases such as D'Silv Lister House Development Ltd. (supra) saying at page 15:-

> "Apart, however, from authority, it is submitted that section 74(1) cannot properly bear the construction put upon it in (D'Silva's case). Reference to sections 73(1) and 74(3) of the Act show that execution is being used in the narrower sense, so as not to include delivery. Moreover, the purpose of the section is fairly plainly to absolve a purchaser from having to make inquiries as to compliance, with the formalities of affixing its seal as provided by the company's articles. To dispense with delivery of a deed would be a revolutionary change in the law, inappropriate to the context in which these sections of

the Law of Property Act, 1925 occur, and unlikely to be effected without clear language."

Albery points out that one result of holding that section 74 abolishes the necessity of delivery in favour of a purchaser is that such a deed could not be delivered as an escrow. A deed cannot be sealed in escrow, it can only be delivered in escrow: see per Fry J. in Gartsill v. Silkstone and Dodsworth Coal and Iron Co. (1882) 21 Ch.D. 762 at 768. As a result a corporation in such a situation would be in the difficult position of being unable to delay the operation of an executed document.

It is unlikely that the view expressed by Buckley J. that under section 74(1) delivery is deemed will be followed in those States of Australia in which identical provisions have been enacted. This would appear from the judgment of Mr. Justice Helsham, the Chief Judge in Equity in New South Wales in the case of Hooker Industrial Developments Pty. Ltd. v. Trustees of the Christian Brothers (1977) 2 N.S.W.L.R. 109. The judge in that case, after endorsing the views of Albery set out above, held that execution in the section was being used in the narrow sense so as not to include delivery.

It seems therefore that the Courts have recognised that there is a practical necessity for corporations to be capable of delaying a duly sealed deed. This being so, it is most unlikely that the Courts will consider section 68A(3)(e), which on its face only attempts to deal with sealing, to have had any effect on the law relating to delivery. The Committee therefore assumes for the purposes of this Report that section 68A(3)(e) does not alter the law relating to delivery of deeds and therefore need

not make any particular recommendations with respect to compa
and delivery of deeds.

The Need For Reform

Presently a number of difficulties exist with res
to delivery of deeds. One such difficulty arises from the
that it is often not clear whether delivery has in
occurred. This is in contrast to earlier times when deli
was something more tangible such as a physical handing over
clear statement that the deed was to be considered operati
Now, however, the question of whether delivery has in
occurred depends upon the intention of the grantor, which
course often not entirely clear to other persons. While
not recommended that the law return to requiring a more tan
form of delivery, this difficulty is a factor which shou
kept in mind when consideration is given to reform.

Further difficulties arise when a grantor wish
delay the operation of a deed. A grantor wishing to do thi
two choices. First, he may deliver the deed as an escrow;
is upon a condition such as that the other party hand ove
purchase price at settlement. This method does ha
disadvantage however and that is that the grantor will be u
to revoke the deed.

The second method whereby a grantor may dela
operation of the deed is to delay delivery. For example,
get his solicitor to deliver at settlement. This method h
advantage of not binding the grantor before the time of del
but is not without its own problems; the main one beinc

before an agent may deliver on the grantor's behalf that agent will need authorisation under seal.

The Committee is of the view that the present situation with respect to delivery of deeds is unsatisfactory and that statutory reform is called for.

Reform in this area has already been implemented in three States. In Queensland pursuant to recommendations made by the Queensland Law Reform Commission in their Sixteenth Report, the Property Law Act, 1974 now provides in section 47:-

(1) After the commencement of this Act, execution of an instrument -

(a) in the form of a deed, or

(b) in the form provided in section 45, or section 46

shall not of itself import delivery, nor shall delivery be presumed from the fact of such execution unless it appears that execution of the document was intended to constitute delivery thereof.

(2) Subject to subsection (1), delivery may be inferred from any fact or circumstance, including words or conduct, indicative of delivery.

(3) In this section "delivery" means the intention to be legally bound either immediately or subject to fulfilment of a condition.

This Committee does not however recommend similar reform in this State. This Committee endorses the criticisms of the Queensland provision which the Law Reform Commissioner of Victoria made when reporting on Delivery of Deeds. The Commissioner said at paragraph 38:-

"It will be appreciated that subsections (2) and (3) do no more than state what has been said previously in this report to be the law on delivery of deeds in Victoria. Subsection (1) seems to be effectual to abolish what could be a useful presumption if there be no other evidence as to delivery and it is thought that it may create more problems than it solves. Consequently, it is not recommended that a similar section be added to the Property Law Act, 1958."

This Committee is of the view that the Queen provision would have the effect of favouring the grantor a expense of persons seeking to rely upon the deed. Section by providing that delivery is not to be presumed from exec of the document in conformity with the provisions of th appears to put the onus of proving delivery upon those pe seeking to rely upon the deed. This appears to this Commit be an undesirable result. We are of the view that whe grantor has signed a deed, the onus should be on him to that the deed was not intended to operate immediately an where such conditional execution is not expressed on the f the instrument itself, he should not be permitted to rel that condition to defeat the claims of parties who have ac reliance on execution without actual notice of that cond This will of course have the benefit of encouraging grant make their intentions perfectly obvious from the outset.

Another State which has introduced reform in th of delivery of deeds is Victoria. The Law Reform Commissio Victoria, after rejecting the method of reform adopt Queensland, went on to recommend that the rule requiring ar to be authorised by deed to deliver a deed on behalf principal be abolished (see supra). Following this recommer the Victorian Property Law Act 1958 was amended accord

Section 73B of that Act now provides:-

> "73 (1) The rule of law that the authority to an agent to deliver a deed on behalf of another is required to be conferred by an instrument under seal duly executed by the principal is hereby abrogated.
>
> (2) This section shall apply to authorities conferred before or after the commencement of this Act."

This provision has the benefit of making it easier for a grantor to delay the delivery and hence operation of a deed until such time as it is thought desirable.

Although of the view that such a reform would be of greater assistance than that implemented in Queensland, the Committee believes that more sweeping reform is called for. Namely, to abolish delivery in its present form and to replace it with a statutory code which would clarify the method whereby the execution of deeds could be suspended pending the fulfilment of a condition.

It might appear that Western Australia may have already abolished delivery. Section 10(3) of the Western Australian Property Law Act, 1969 provides, "formal delivery and indenting are not necessary in any case". An identical provision also appears in section 4(3) of the New Zealand Property Law Act, 1952. It would seem, however, that these provisions have merely endorsed the change in the common law position that there is no longer a requirement for a formal handing over or statement as to the effectiveness of the deed. The use of the word formal raises considerable doubt as to whether these amendments have in fact abolished delivery.

Burrows comments on the effect of the New Zealand sub-section in an article entitled The Law Relating to Deeds in New

Zealand (1969-1972) 2 Otago L.R. 240 saying at page 244:-

> "This obviously cannot mean that a deed invariably has immediate effect the moment it has been signed and attested, without any delivery at all; if that were so a conveyance of land under a deeds system would be completed as soon as the vendor signed the deed, and before the moment of settlement. It is clear that the important word is "formal", and that all this section does is to remove the ancient common law requirement of a formal handing over; it does not dispense with the need of an intention by the grantor, evidenced in some way, to be bound by the deed. Further, it has been held by the New Zealand Court of Appeal that this section does not preclude the possibility of an escrow in this country; a document may still be validly handed to another subject to a condition precedent as to its effectiveness as a deed.
>
> If this is so, the position in New Zealand as regards delivery is the same as in England. The subsection in question may therefore be mere surplusage.

It appears to be the position that the existenc Section 4(3) has not had the effect of making the law as to delivery of deeds in New Zealand substantially different the law in England and Australia. This fact became clear the decision of the Court of Appeal in Re Goile (1963) N.Z. 666. The Court in that case said that they had no doubt th person could execute a deed and deliver it to the other p thereto subject to a condition precedent. The Court sai Section 4(3) at page 682:-

> "This subsection, which has remained in its present form since 1883, is part of a section exclusively devoted to the operation of deeds, and provides "that formal delivery and indenting are not necessary in any case". Mr. Patterson contended that the effect of this subsection is that where the signatory to the deed is a real person and not a corporation, then if the formalities of execution and attestation prescribed by subsection (1) are completed, the deed thereupon becomes binding and irrevocable.
>
> It is clear from the terms of the subsection that in New Zealand something less than the formal rite of delivery historically required by the common law is sufficient to render a deed operative. This is not to

say however that it becomes operative - at least in the case of mutual obligation - on the execution and attestation without any further act on the part of the signatory. Something more must undoubtedly be said or done indicative of his intention to be bound."

And then on page 683:-

"There is indeed a continuous line of authority contrary to Mr. Patterson's submission from which it is apparent that notwithstanding section 4(3) of the Property Law Act, 1952 and the statutory provisions which preceded it, new Zealand Courts have thought it practicable to execute a deed as an escrow in this country - see for instance Ani Waata v. Grice (1883) N.Z.L.R. 2 C.A. 95; In re Infield, a debtor (1894) 12 N.Z.L.R. 582."

In re Goile was subsequently applied in Poole v. Neely (1976) 1 N.Z.L.R. 529 where it was held:-

(1) That it is possible for a deed to be delivered in escrow to the other party thereto. Richmond J. pointed out in this regard at page 535 that although the Court in Re Goile (1963) N.Z.L.R. 666 had somewhat confined the scope of the decision by using the words "at least one containing mutual covenants" (ibid. 682), it was not entirely clear to him why that reservation should be made. Richmond J. said that he could find nothing in the authorities which would prevent the principles as to delivery in escrow applying to a deed, such as a debenture in the present case, which is executed by one party only.

(2) That the question whether a document is delivered in escrow or as a deed is a question of fact as to what the parties intended and if the intention is not expressly stated the intention may appear either from their statements or the circumstances.

(3) The circumstances relied upon must be prior to or contemporaneous with, not subsequent to, the delivery of the

document.

Since the case of In re Goile (1963) N.Z.L.R. 6 fairly consistent view of the effect of Section 4(3) has taken by the New Zealand Courts. However as counsel fo plaintiff pointed out in that case, there was more tha interpretation which could have been given to the section.

Mr. Patterson for the plaintiff said at page 674 o report:-

> "In New Zealand there are three possible constructions as to the operations of deeds:-
>
> (1) they become binding on the completion of the formalities contained in sections 4 and 5 of the Property Law Act;
>
> (2) they become binding when the maker or his agent voluntarily parts or agrees to part with physical possession: In re Wall (deceased), Wall v. Wall (1952) G.L.R. 235, 242;
>
> (3) they become binding in accordance with the maker's manifest intention gathered from his language or the circumstances."

Mr. Patterson contended strongly that the possible construction was the correct one. This would have that the deed would have become effective immediately (de the fact that the defendant's solicitors had sent the deed t plaintiff's solicitors with a letter saying that the deed w be held in escrow until the plaintiff had paid the sum whi due from him under the deed).

The Court of Appeal however said that the construction was correct. This would appear to have the of making New Zealand law as to delivery of deeds and deliv escrow practically identical to that in England and Austral

Presumably the same reasoning would be used by a

when applying the identical Western Australian provisions, and similarly, if such provisions were introduced in this State. Indeed if the section were to be interpreted in any other manner the results would be most unfortunate. Deeds would take effect immediately upon being executed in accordance with the relevant statutory provisions; in this State the present Section 41 of the Law of Property Act, 1936. Grantors would not have available to them the option of executing deeds in accordance with section 41, but postponing the operation of the deed until some later date or the happening of some future event. This situation would be most unsatisfactory.

Due to the realities of the business world, it is not always possible to have the necessary people available to execute documents at the precise moment that it is intended that they become operational. As a result, it will always be necessary to have some sort of mechanism whereby a duly executed document can be "put on ice".

It is clear therefore that if "delivery" were to be abolished, then it would need to be replaced by some other mechanism which would allow delay in the operation of a deed which had been executed.

Extension of the reform to all instruments

Given that substantial reform is to be undertaken with respect to delaying the operation of deeds, the Committee has given consideration to the desirability of extending its proposals to all instruments.

A mechanism already exists whereby the operation of a contract may be suspended: the operation of a contract may be

made subject to a condition precedent. Such a condition either be precedent to the contract itself, so that unless until it is met there is no contract at all, or be preceder performance so that although the contract will not come f into operation until its fulfilment, pending its fulfilment contract subsists and is effective. In any given situatic will be a question of construction whether the conditio precedent to contract or to performance. This is oft difficult question. Cheshire and Fifoot in The Law of Con (4th Aust. Ed. 1981), after commenting on this fact, illus the point in the following way at pages 106-107:

> "Thus in Bentworth Finance Ltd v. Lubert (1968) 1 Q.B. 680; (1967) 2 All E.R. 810:
>
> The plaintiffs, under a hire purchase agreement, let, a secondhand car to the defendant, who was to pay 24 monthly instalments. The car was delivered to the defendant but without a log book. The defendant neither licensed nor used it and refused to pay the instalments. The plaintiffs retook possession of the car and sued for the instalments.
>
> The English Court of Appeal held that the plaintiffs could not sue the defendant, as there was no hire purchase contract and, therefore, no instalments due; the delivery of the log book was a "condition on which the very existence of the contract depended". It is nevertheless difficult to accept that factually the parties did not regard themselves from the outset as being in a contractual relationship. On the other hand, in Smallman v. Smallman (1971) 3 All E.R. 717 where, after a marriage breakdown, a husband and wife sought to make overall arrangements with regard to their property, the custody and maintenance of their children, and the proceedings for divorce, their agreement being "subject to the approval in due course of the court", the English Court of Appeal held that there was a subsisting agreement, the operation of which was suspended pending approval by the court. Until application to the court and the court's approval, the agreement remained a binding transaction which neither party could disavow, and which came fully into operation upon receiving approval."

For a further list of cases illustrating

circumstances in which conditions have been held to be either precedent to contract or precedent to performance see Halsbury's Law of England 4th Ed. Volume 9 "Contracts" paragraph 264.

It would seem that imposing a condition precedent to contract may be roughly equated with delaying delivery of a deed, while imposing a condition precedent to performance is more closely akin to delivering an escrow. That is to say where a condition is precedent to contract there is no contract at all until the condition is fulfilled, and presumably in the meantime both parties will be entitled to withdraw, just as a grantor is entitled to resile from a deed which has not been delivered. However, where the condition is precedent to performance a binding contract arises and the parties will be bound to await the fulfilment of the condition just as a grantor who has delivered in escrow must await the fulfilment of the condition upon which the operation of his deed is dependant.

It is interesting to note that Leake on Contracts (8th Ed.) has already equated the conditional executing of documents with delivery of deeds in escrow. Leake said at page 98:-

> "The delivery of a deed may be made upon a condition, so that the delivery is not complete and the deed not binding until the condition is satisfied, and it is then called an escrow. The condition may be expressly declared, or it may sufficiently appear from the circumstances attending the delivery. . . . . Delivery as an escrow may be made whilst the party retains the deed in his own possession, or upon delivery of the possession to a third party, or to the solicitor of the other party to the deed, or even, it would seem, upon delivery of possession to the other party himself. After a deed has been delivered as an escrow, the fact of possession of it by the other party is presumptive evidence that the condition has been satisfied, and that the delivery is complete. Similar principles are applicable to documents under hand only, the signature of which may be a conditional execution."

Leake cites as authority for this proposition E

Campbell 25 L.J. Q.B. 277, 4 W.R. 528, 119 E.R. 903:-

> "In that case the facts as found by the jury were that the defendant at the time of negotiation declined to purchase shares in the particular invention, unless their engineer approved of the machine. As the engineer was absent and one of the defendants could not conveniently return to sign the document after seeing him, it was expressly stated and assented to by the plaintiff that the defendants signed the memorandum conditionally upon the engineer's approval being obtained. However, the engineer disapproved of the machine."

It would appear that Leake's contention that thi is authority for the view that principles similar to delive deeds in escrow apply to contract is not correct. Although is some conflict between the reports as to the terms and e of the judgments, the Court apparently took the view that was no concluded contract, that is to say that approval b engineer was a condition precedent to the contract itself is more akin to withholding delivery entirely than to deli as an escrow.

However that may be, the Committee recognizes there are many circumstances in which the operati instruments other than deeds needs to be suspended, and con that proposals for reform should extend to instruments othe deeds. In practice, countless documents are executed, wi intention that they shall not become binding until the occu of a future event.

A prime example is a Memorandum of Transfer. In

Australia a transfer is normally executed by the transferor and accepted by the transferee some time before settlement in order that it may be stamped prior to settlement. What is the effect of such a transfer document? If it is an escrow, it is binding on the transferor.

This is not a satisfactory state of affairs for the transferor. Nor would it be satisfactory for any Memorandum of Transfer to be handed over having been effectively executed by the transferor. It should be made clear that the effectiveness of the execution by the transferor can be suspended.

Stamp Duty

If an instrument has been executed on the basis that the execution is ineffective until that instrument is released by the party (e.g. at settlement), it is not in actual fact stampable prior to that time. Furthermore, in any case where a condition of execution is not fulfilled, stamp duty paid should be refundable.

The Committee is of the view that uncertainty in this area should be resolved and recommends that the Stamp Duties Act, 1923, as amended, should be amended to provide that an instrument is liable to duty according to its terms notwithstanding the existence of any condition affecting its execution but that if any such condition is not fulfilled, the Commissioner be obliged on proof of the circumstances to cancel the stamp on the instrument and refund any duty paid, possibly with interest.

Proposals for Reform of the Law

In the Committee's view, the most appropriate method of reform to the law is to abandon the concepts of delivery and delivery in escrow in favour of a statutory code which would set out clearly the manner in which the effectiveness of the execution of an executed document could be delayed. In their place would be enacted a statutory code, preferably in the South Australian Law of Property Act, 1936, as amended. The Code would extend to all instruments other than wills and would not be limited to deeds. The code in dealing with the effectiveness of execution rather than with the effectiveness of the document or some part of it would not impinge on the law relating to conditional contracts, an area which the Committee would wish to avoid. The Code would also spell out how a deed is to be executed so that S.41 of the Law of Property Act, 1936 would have to be reframed.

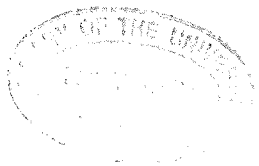
The Committee contemplates that any proposals for reform should only apply prospectively, that is, to instruments executed after the amendments take effect.

Recommendations

Having regard to the matters considered in this Report the Committee recommends:

1. The concept of delivery of deeds (both in respect of individuals and bodies corporate) should be abolished. Subject to what is said below regarding conditional execution, a deed should be complete when executed.

2. Any instrument (whether or not a deed, but not being a



will) should be capable of being executed upon a condition so that execution is not effective and the instrument not binding upon the person executing it unless and until the condition is fulfilled.

3. Further, any instrument should be capable of being executed subject to a condition that the party executing the instrument is not to be bound unless and until he or someone on his behalf gives some further indication of that parties intention to be bound by the instrument.

4. Such conditions as we have described in paras (2) and (3) above may be written in or on the instrument concerned or may be contained in any other instrument or may be expressed orally or may be inferred from the circumstances attending the execution and evincing an intention that the execution be conditional.

5. Where an instrument is conditionally executed and the fulfilment of that condition is not within the control of the party by whom the instrument was conditionally executed then, subject to any contrary intention appearing from the instrument itself, it should not be possible for the instrument to be recalled and upon fulfilment of the condition the execution should take effect as if from the time of execution or from some such later time as the instrument indicates execution is intended to take effect.

6. Where an instrument is conditionally executed and the fulfilment of that condition is within the control of the party by whom the instrument was conditionally executed then it should be possible to recall the execution any time prior to the fulfilment of the condition without breach of the obligation by

that party and, upon the fulfilment of that condition the execution (if not previously recalled) should take effect from the time of the fulfilment of the condition or from such later time as the instrument indicates execution is intended to take effect.

7. Notwithstanding the foregoing, where the conditional execution of an instrument is not expressed in the instrument itself, then the party relying on that condition to defeat the claim of another party should not be permitted to do so where the other party or a person claiming under him has acted on that instrument or relied on its execution without actual notice of the condition. In such circumstances, the absence of actual knowledge should entitle the latter to act upon and in relation to such an instrument as if no such condition had been imposed.

8. In legal proceedings, once execution of an instrument is proved, that execution should, in the absence of proof to the contrary, be presumed unconditional. Where the evidence shows that the instrument was executed conditionally then there should be a presumption that the condition has been fulfilled. Thus, the onus of proving conditional execution and the non-fulfilment of conditions should be upon the party by or on whose behalf those conditions are imposed.

9. Any amendment to the Law of Property Act should only apply to deeds executed after the amendment takes effect.

10. Amendments to the Law of Property Act should expressly provide for the abolition of the common law doctrine of escrow.

11. A deed should be regarded as executed by a person when he signs or makes his mark upon the deed. In the case of bodies

corporate, a deed should be executed by affixation of its common seal in accordance with rules governing use of the common seal. Where the party concerned is a natural person then a deed may be executed by another person acting at the direction and in the presence of the party and without any necessity for such authority to have been conferred by deed. In the case of bodies corporate, only attorneys authorised by deed should be permitted to execute a deed in the absence of the body corporate's common seal.

12. In the event that the execution by or on behalf of a party to a deed (including bodies corporate) is defective, the execution should nevertheless be deemed to be valid where it appears from external evidence that the party intended to be bound by the deed.

13. Notwithstanding any other laws to the contrary an instrument executed in the manner outlined above should be deemed a deed if expressed to be an indenture or deed, or, in the case of bodies corporate, is expressed to be sealed and delivered or, again, in the case of natural persons, simply expressed to be sealed or, where it appears from the circumstances of execution or the nature of the instrument that the parties intended it to be a deed. Further, notwithstanding defective execution, the execution of an instrument should be deemed valid whenever evidence external to the deed shows that the party whose execution is defective nevertheless intended to be bound by the instrument.

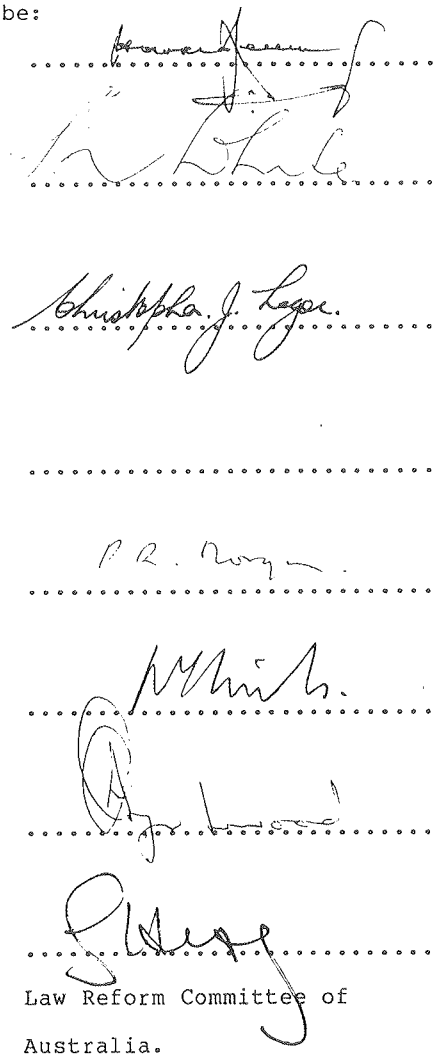
14. The Stamp Duties Act should be amended to provide that an instrument is liable to duty according to its terms notwithstanding the existence of any conditional execution, but

if any such condition is not fulfilled, the Commissioner shall, on proof of the circumstances, cancel the stamp on the instrument and refund any duty paid.

Parliamentary Counsel have kindly prepared draft legislation encompassing the recommendations of this report. The draft bill is annexed to this report as Annexure B.

It should be noted that while the proposed new section 41(1)(b) of the Law of Property Act, 1936 states how a deed is executed by a corporation the draft Bill does not extend the principles of section 68A of the Companies (South Australia) Code 1981 to corporations other than the companies to which that section applies. The Committee has not considered the desirability of the Bill covering this matter but would be pleased to do so if so requested.

We have the honour to be:



Law Reform Committee of Australia.

Mr. M.F. Gray Q.C. had ceased to be a member of the Committee when this report was signed.

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ANNEXURE "A"

Law of Property Act 1936-1984

41. (1) Where a person proposes to execute a deed, he must sign or place his mark upon the deed.

(2a) A deed may be executed by a person on behalf of another -

(a) pursuant to an authority conferred by deed;
or
(b) by direction and in the presence of that other person.

(2b) Where, on or after the commencement of the Law of Property Act Amendment Act, 1984, a deed is executed by a person by direction and in the presence of a party to the deed, the attesting witness or, where there is more than one attesting witness, at least one of them must be a person authorized by law to take affidavits.

(2) The signature or mark of a party to a deed, or of a person executing the deed on behalf of a party to the deed, must be attested by at least one witness who is not a party to the deed.

(3) Indenting shall not be necessary in any case.

(4) Every instrument expressed to be an indenture or a deed, or to be sealed, which is executed and attested in accordance with this section, shall be deemed to be sealed.

(5) This section does not effect -

(a) the law relating to the execution of a deed be a corporation

(b) the validity, operation or effect of a deed executed before the commencement of the Law of Property Act Amendment Act. 1972;

(c) the manner in which a deed is proved;
or
(d) the law relating to undelivered deeds or deeds in escrow.

(6) Where it appears in any proceedings -

(a) that a deed has not been duly executed by, or on behalf of, a party to the deed;
or

(b) that the signature or mark of a party to a deed, or a person acting on his behalf, has not been duly attested, but that the party to the deed, or person acting on his behalf, purported or intended to execute the deed, and that party has taken a benefit under the deed, then, for the purposes of this section, the deed shall be deemed to have been duly executed by or on behalf of that party to the deed, and the execution shall be deemed to have been duly attested.

ANNEXURE "B"

[Prepared by the Parliamentary Counsel]

1986

A BILL FOR

An Act to amend the Law of Property Act, 1936.
BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

1. (1) This Act may be cited as the "Law of Property Act Amendment Act, 1986".

(2) The Law of Property Act, 1936, is in this Act referred to as "the principal Act".

2. Section 41 of the principal Act is repealed and the following sections are substituted:

41. (1) The following rules govern the execution of a deed:

(a) a natural person executes a deed by signing, or making a mark, on the deed;

(b) a body corporate executes a deed by affixation of the common seal of the body corporate to the deed in accordance with the rules governing the use of the common seal;

(c) a deed may be executed on behalf of a party to a deed -

(i) by an attorney acting in pursuance of an authority conferred by deed;
or
(ii) where a party is a natural person - by a person acting at the direction, and in the presence, of the party.

(2) The execution of a deed by a natural person must be attested by at least one witness who is not a party to the deed and, where a deed is executed by a person acting at the direction and in the presence of the party, the execution must be attested by a person who is authorized by law to take affidavits.

(3) Delivery and indenting are not necessary in any case.

(4) Notwithstanding the defective execution of a deed by or on behalf of a party to the deed, the execution shall be deemed to be valid if it appears from evidence external to the deed that the party intended to be bound by it.

(5) Notwithstanding any other law, an instrument executed in accordance with this section is a deed if

(a) the instrument is expressed to be an indenture of deed;

(b) the instrument is expressed to be sealed and delivered or, in the case of an instrument executed by a natural person, to be sealed;
or
(c) it appears from the circumstances of execution of the instrument or from the nature of the instrument that the parties intended it to be a deed.

41aa. (1) A party may execute an instrument (not being a will)-

(a) subject to a condition that the execution is not to be effective until the party gives (personally or by an agent) some further indication of the party's intention to be bound by the instrument;
or
(b) subject to some other condition on the fulfilment of which the execution is to become effective.

(2) The conditional execution of an instrument may be expressed orally, in writing, or by conduct evincing an intention that the execution should be conditional.

(3) Where an instrument is conditionally executed, then, subject to subsection (4) and any contrary intention that appears from the instrument -

(a) the execution cannot be recalled;
and
(b) on the fulfilment of the condition, the execution takes effect -

(i) from the time of execution;
or
(ii) if it appears from the instrument or the condition of execution that the execution is intended to take effect from some later time - from that later time.

(4) Where an instrument is conditionally executed and the fulfilment of the condition is within the control of the party by whom the instrument was conditionally executed, then -

(a) the execution may be recalled at any time prior to the

fulfilment of the condition without breach of obligation by the party
and

(b) on the fulfilment of the condition, the execution (if not previously recalled) takes effect -

(i) if it appears from the instrument or the condition of execution that the execution is intended to take effect from some later time - from that later time.

(5) Notwithstanding subsections (3) and (4), where the conditional execution of an instrument is not expressed in the instrument itself the party by whom the instrument was conditionally executed cannot rely on the condition to defeat the claim of -

(a) another party who has acted on the instrument or relied on its execution without actual notice of the condition;
or

(b) a person claiming under any such party.

(6) In any legal proceedings -

(a) if the execution of an instrument is proved, the execution shall be presumed, in the absence of proof to the contrary, to have been unconditional;
and

(b) if it appears from an instrument or evidence external to an instrument that the instrument was executed conditionally, it shall be presumed, in the absence of proof to the contrary, that the condition of execution has been fulfilled.

(7) The common law doctrine of escrow is abolished.

3. New sections 41 and 41aa inserted by this Act do not apply to deeds or other instruments executed before the commencement of this Act, nor do they alter the effect of any act or omission occurring before the commencement of this Act.